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In the Supreme Court of the United States

OCTOBER TERM, 1995

DWIGHT J. LOVING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the President had the authority to promulgate Rule for Courts-Martial 1004.

2. Whether a defendant may be sentenced to death by a court-martial panel of fewer than twelve persons.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-227a) is reported at 41 M.J. 213. The initial opinion of the United States Army Court of Military Review, now the United States Army Court of Criminal Appeals (Pet. App. 229a-256a), is reported at 34 M.J. 956, and its opinion denying reconsideration (Pet. App. 257a-265a) is reported at 34 M.J. 1065.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on Novem-

ber 10, 1994. A petition for reconsideration was denied on February 2, 1995. Pet. App. 228a. On April 21, 1995, Chief Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including June 2, 1995, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(1).

STATEMENT

Petitioner was convicted by a general court-martial of premeditated murder, felony murder, attempted murder, and robbery (four specifications), in violation of Articles 118, 80, and 122, Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918, 880, and 922. The court sentenced petitioner to death, a dishonorable discharge, and forfeiture of all pay and allowances. The United States Army Court of Military Review affirmed. 34 M.J. 956, reconsideration denied, 34 M.J. 1065 (A.C.M.R. 1992) (Pet. App. 229a-265a). The United States Court Appeals for the Armed Forces affirmed. Pet. App. 1a-227a.

1. In *United States* v. *Matthews*, 16 M.J. 354 (C.M.A. 1983), the United States Court of Military Appeals (now the United States Court of Appeals for the Armed Forces) analyzed the constitutionality of the military's death penalty provisions, Article 118, UCMJ, 10 U.S.C. 918. After reviewing this Court's cases, the court concluded that certain common features appeared in a constitutionally valid death penalty procedure: a bifurcated sentencing proceeding; specific aggravating circumstances; selection of and findings on the particular aggravating circumstances used by the sentencer to impose the death penalty; unrestricted opportunity for the defendant to present mitigation and extenuation evidence; and mandatory

appellate review of the appropriateness of the sentence. *Id.* at 377.

The *Matthews* court found all of those safeguards present in the military system except for specific aggravating factors.[1] The court held that because court-martial members were not required to identify specifically the aggravating factors relied upon in assessing the death sentence, it was impossible for appellate courts to determine whether the members had made an individualized sentencing determination based on the character of the defendant and the circumstances of the crime. 16 M.J. at 379. The court indicated that either Congress or the President, in his capacity as Commander in Chief and/or pursuant to the powers that Congress delegated to him, could take corrective action. *Id.* at 380 (citing Art. 36, UCMJ, 10 U.S.C. 836).

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[1] The court noted (1) that the military follows a bifurcated sentencing procedure; (2) that "[c]ertain aggravating circumstances, such as premeditation, specific intent, and murder during commission of specified felonies, must be found by the court members * * *. These findings identify the instances in which an accused is eligible for the death penalty. After the findings, evidence may be submitted to identify other aggravating circumstances." 16 M.J. at 378 (citation omitted); (3) that the defendant has an unlimited opportunity to put on evidence in extenuation and mitigation; (4) that there is mandatory review of the facts, law, and sentence appropriateness followed by a mandatory review of the law by the Court of Military Appeals (now the Court of Appeals for the Armed Forces); and (5) that the President, who can take any lesser action on the sentence, must ultimately approve any death sentence. *Ibid.* See generally A. Sullivan, *The President's Power to Promulgate Death Penalty Standards*, 125 Mil. L. Rev. 143 (1989).

The President responded by promulgating Rule for Courts-Martial (RCM) 1004, see Pet. App. 354a-360a (reproducing RCM 1004), which amended the Manual for Courts-Martial to provide procedures for adjudicating cases in which the death penalty is authorized for homicide by Article 118 of the Uniform Code of Military Justice, 10 U.S.C. 918. See *Manual for Courts-Martial, United States, 1984* (*Manual*). RCM 1004, which had been circulated for public comment before the decision in *Matthews*, rectified the deficiency identified in that opinion by enumerating specific aggravating factors, at least one of which the court-martial members must unanimously find in order to impose the death penalty. RCM 1004 also provides that all members of the court-martial must concur that the aggravating circumstance(s) substantially outweigh any extenuating or mitigating circumstances before death can be adjudged. The President caused the 1984 Manual for Courts-Martial and its Rules for Courts-Martial to be issued by "virtue of the authority invested in [him] as President by the Constitution of the United States and by Chapter 47 of Title 10 of the United States Code [*i.e.*, the UCMJ]." Exec. Order No. 12,473, 3 C.F.R. 201 (1984 comp.).

2. During the evening of December 11, 1988, petitioner, an Army private stationed at Fort Hood, Texas, robbed at gun point two different 7-Eleven convenience stores in Killeen, Texas. Pet. App. 3a, 231a; Pet. 4-5. In the first robbery, petitioner fired two shots into the counter and soda fountain, which were behind the cashier; he obtained $38. In the second robbery, petitioner fired a bullet into the cash register, and demanded that the cashier put money in

a paper bag. As he ran out, petitioner fired a round back into the store. He obtained approximately $52 from the second robbery *Id.* at 3a, 231a.

When the 7-Eleven robberies netted him only a small amount of cash, petitioner conceived a plan to rob taxicab drivers. On the evening of December 12, 1988, petitioner called a taxicab to take him from a store in Killeen to his barracks in Fort Hood. The driver of the taxicab was an active-duty soldier, Christopher Fay, who was working for extra money. Petitioner directed Fay to a secluded area on Fort Hood, where he demanded Fay's money at gun point. After receiving some money from Fay, petitioner shot him in the back of the head. While looking at the bleeding wound, petitioner cocked his pistol and again shot Fay in the back of the head. Fay died. Pet. App. 3a-4a, 231a-232a.

Petitioner fled to his barracks and, after counting the money he obtained from Fay, called a second taxicab. That cab was driven by a retired Army sergeant, Bobby Sharbino. Petitioner directed Sharbino to a secluded street in Killeen, where he robbed Sharbino of his money pouch, wallet, and other personal effects. Petitioner then ordered Sharbino to lie down on a car seat and shot him in the head, killing him. Pet. App. 4a, 232a.

Later that evening, petitioner took his girlfriend to a nightclub in Killeen. Upon leaving, petitioner and his girlfriend entered a taxicab driven by Howard Harrison. After dropping his girlfriend off near her residence, petitioner directed Harrison to a secluded area and robbed him at gun point. Petitioner then attempted to kill Harrison. Harrison struggled with

petitioner, disarmed him, and fled. Pet. App. 4a-5a, 232a-233a.

Acting on leads provided by Harrison, law enforcement agents, including agents of the Army Criminal Investigation Command (CID), arrested petitioner in the afternoon of December 13, 1988. Petitioner was taken to the CID office, where, after being advised of his rights, he made a full videotaped confession describing his crimes in detail. Searches of the area surrounding petitioner's girlfriend's residence, and of the residence and other places frequented by petitioner, resulted in the recovery of the weapon used in the murders and robberies, spent and unspent bullets, petitioner's blood-stained jacket, and effects taken from the murder victims. Pet. App. 232a n.2, 233a, 5a, 7a. Later, while incarcerated at the U.S. Army facility at Fort Riley, Kansas, petitioner told a fellow inmate that he had committed the first murder "to see if he could get away with it," and the second murder "because it was fun," and that "if he had to do it over, the only difference is he wouldn't get caught." *Id.* at 68a-69a.

An eight-member court-martial unanimously found petitioner guilty of the premeditated murder of Sharbino and of the felony murder of Fay. By a non-unanimous vote, the court-martial also found petitioner guilty of attempting to murder Harrison, of robbing Sharbino and Harrison, and of robbing the 7-Eleven stores. Pet. App. 8a-9a.[2] After a hearing

[2] In addition, petitioner was found guilty of the premeditated murder of Fay, the robbery of Fay, and the felony murder of Sharbino. After the findings were announced, the military judge dismissed those specifications as multiplicitous. Pet. App. 9a.

conducted in accordance with RCM 1004, the court-martial unanimously found, as aggravating factors, that the premeditated murder of Sharbino was committed while petitioner was engaged in a robbery (see RCM 1004(c)(7)), that in the felony murder of Fay petitioner acted as the triggerman (see RCM 1004(c)(8)), and that petitioner, having been found guilty of the premeditated murder of Sharbino, was found guilty of another murder in the same case (see RCM 1004(c)(7)(J)). Pet. App. 253a-254a. The court-martial unanimously sentenced petitioner to death, a dishonorable discharge, and forfeiture of all pay and allowances. The convening authority approved the findings and sentence. Pet. App. 9a, 230a.[3]

3. The Army Court of Military Review affirmed the findings and sentence. Pet. App. 229a-256a. In accordance with Article 66, UCMJ, 10 U.S.C. 866, the court independently weighed the evidence and "agree[d] with each of the aggravating factors found by the court-martial." Pet. App. 254a. The court also found "that any extenuating and mitigating circumstances are substantially outweighed by the aggravating circumstances." *Ibid.*

On appeal, petitioner argued that Article 118, UCMJ, 10 U.S.C. 918, is unconstitutional under *Furman* v. *Georgia*, 408 U.S. 238 (1972), in that it does not sufficiently narrow the class of death-eligible defendants, and that the President exceeded his authority under the Constitution and the UCMJ

[3] The "convening authority" is the commander who convenes the court-martial. The convening authority selects the court-martial members, directs that the accused be tried by the court-martial for the charged offenses, and conducts a post-trial review of the proceedings.

in promulgating RCM 1004 to provide specific aggravating factors. The court found those claims foreclosed by *United States* v. *Curtis*, 32 M.J. 252 (C.M.A.), cert. denied, 112 S. Ct. 406 (1991). Pet. App. 230a. In that case, the Court of Military Appeals had upheld RCM 1004 against similar attacks. See Pet. App. 346a-384a (reproducing *Curtis* opinion).

The *Curtis* court concluded that under the Uniform Code of Military Justice, the President has long "play[ed] the major role in determining what punishments may be imposed by courts-martial." Pet. App. 362a-363a. It held that several provisions of the UCMJ, particularly Articles 18, 36, and 56, UCMJ, 10 U.S.C. 818, 836, and 856, authorized the President to promulgate aggravating factors for capital cases. Relying on *Mistretta* v. *United States*, 488 U.S. 361 (1989), the *Curtis* court rejected a separation-of-powers challenge to that delegation, noting that "[i]n view of [the President's] inherent constitutional authority [as Commander-in-Chief of the Armed Forces], a separation-of-powers objection has much less merit in the present context than if the 'aggravating factors' for capital cases tried by courts-martial had been formulated by a specially created commission." Pet. App. 361a-362a. *Curtis* also rejected the contention that Congress failed to give the President an intelligible principle for the exercise of the delegated powers, explaining that the UCMJ's direction in Article 36 that the President apply "the principles of law" that are generally applied in federal district courts constitutes an adequate standard. Pet. App. 368a.

Petitioner also argued that only a court-martial panel composed of 12 members can constitutionally

impose the death penalty. The Army Court of Military Review found that claim meritless on the authority of *Curtis* (Pet. App. 230a), which rejected that claim on the grounds (1) that the jury-trial requirement of the Sixth Amendment does not apply to courts-martial, Pet. App. 375a-376a (citing *Ex parte Quirin*, 317 U.S. 1 (1942)), (2) that a civilian judge alone may be entrusted with imposing a death sentence, Pet. App. 376a (citing, *inter alia*, *Clemons* v. *Mississippi*, 494 U.S. 738 (1990), and *Spaziano* v. *Florida*, 468 U.S. 447 (1984)), and (3) that the military justice system includes significant post-sentence safeguards to minimize the risk of erroneous imposition of the death penalty. Pet. App. 376a-377a.

3. The Court of Appeals for the Armed Forces affirmed. Pet. App. 1a-227a. The court summarily rejected, on the authority of *Curtis* and *Matthews*, petitioner's claims that the President lacked constitutional and statutory authority to promulgate RCM 1004, and that a court-martial panel of fewer than 12 members may not constitutionally sentence a defendant to death. Pet. App. 128a-129a (challenge to size of court-martial panel); *id.* at 141a-142a (challenges to constitutionality of RCM 1004).

ARGUMENT

1. Petitioner contends that Congress has not explicitly or implicitly delegated to the President any authority to prescribe aggravating factors (Pet. 14-15), and, if Congress has done so, such delegation is unconstitutional because that authority may not be delegated at all (Pet. 9-11), because the delegation impermissibly combines in the President the power to make and enforce laws (Pet. 11-14), or because Congress failed to set forth sufficient standards to guide

the President's exercise of his authority (Pet. 19-23). Those claims lack merit and do not warrant review.

a. In *Furman* v. *Georgia*, 408 U.S. 238 (1972), this Court held that the death penalty cannot be imposed under procedures that create a substantial risk that it will be inflicted in an arbitrary manner. See, *e.g.*, *McCleskey* v. *Kemp*, 481 U.S. 279, 301 (1987); *California* v. *Brown*, 479 U.S. 538, 541 (1987); *Gregg* v. *Georgia*, 428 U.S. 153, 188 (1976) (lead opinion). Contrary to petitioner's contention (Pet. 8-9), *Furman* did not hold unconstitutional Congress's judgment that the death penalty is a lawful punishment for premeditated or felony murder in the military justice system. See Art. 118, UCMJ, 10 U.S.C. 918. *Furman* requires only that appropriate safeguards exist in order for Article 118 to be implemented in a constitutional manner. Compare *Dobbert* v. *Florida*, 432 U.S. 282, 293-294, 297-298 (1977) (rejecting argument that there "was no death penalty 'in effect' in Florida" at the time of defendant's crime, because Florida had not yet acted to comply with the dictates of *Furman*; upholding retroactive application of Florida's post-*Furman* capital sentencing law on the ground that the changes were merely "procedural").

The President had ample authority to prescribe the safeguards that will result in the constitutional application of the statute that Congress enacted. In addition to his constitutional authority as "Commander in Chief of the Army and Navy," U.S. Const. Art. II, § 2, Cl. 1, three provisions of the Uniform Code of Military Justice make clear that the President has the power to devise sentencing procedures for capital cases. Article 18, UCMJ, 10 U.S.C. 818, which sets forth the jurisdiction of general courts-

martial, provides that such courts-martial "may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter." Article 36, UCMJ, 10 U.S.C. 836, empowers the President to prescribe "trial[] and post-trial procedures * * * for cases triable in courts-martial" by regulations that "shall, so far as [the President] considers practicable, apply the principles of law * * * generally recognized in the trial of criminal cases in the United States district courts." And Article 56, UCMJ, 10 U.S.C. 856, authorizes the President to limit the maximum punishment a court-martial may impose. See, *e.g.*, *United States* v. *Prescott*, 2 C.M.A. 122, 124-125, 6 C.M.R. 122, 124-125 (1952). Together, those Articles authorize the President to prescribe whatever procedures are necessary to assure that Article 118 can be implemented constitutionally.

Any doubt as to whether the UCMJ delegates to the President authority to promulgate RCM 1004 was eliminated by Congress's enactment in 1985 of Article 106a, UCMJ, 10 U.S.C. 906a, which makes it a capital offense for a servicemember to engage in espionage. That provision lists three specific aggravating factors and further states that aggravating factors include "[a]ny other factor that may be prescribed by the President by regulations under [Article 36]." See 10 U.S.C. 906a(c)(4). Article 106a therefore clearly reflects congressional understanding that the UCMJ, including Article 36, gives the President delegated authority to promulgate aggravating factors in capital cases. The conference report on the legislation makes the point even more clearly, stating that:

> Nothing in the new Article 106a is meant to preclude a prosecution under any other article of the UCMJ[.] * * *
>
> * * * * *
>
> The conferees did, however, adopt a statutory formulation of capital sentencing standards for espionage cases and intend that those standards be implemented in a manner consistent with the provisions of Rule for Courts-Martial 1004 of the Manual for Courts-Martial, 1984. The conferees do not intend that the enactment of statutory capital sentencing standards for the new Article 106a be construed as affecting the validity of the regulatory capital sentencing standards that already exist for the other capital punitive articles.

H.R. Conf. Rep. No. 235, 99th Cong., 1st Sess. 425 (1985). Where Congress has, as it did here, passed new legislation in specific reliance on a particular interpretation of existing laws, there is strong reason to give effect to that interpretation. See, *e.g.*, *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407, 2414 (1995); *Stone* v. *INS*, 115 S. Ct. 1537, 1545, 1549 (1995).[4]

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[4] Petitioner suggests (Pet. 18-19) that Article 106a evidences Congress's belief that the President lacks delegated authority to promulgate aggravating factors in capital cases, because Article 106a delegates that authority to the President only in espionage cases. The problem with that claim is that Article 106a(c)(4) expressly recognizes that the President's authority to promulgate aggravating factors will be exercised "under section 836 of this title (article 36)," 10 U.S.C. 906a(c)(4), a provision that is not limited to espionage cases. There is no greater merit to petitioner's contention that Article 106a should not be read to reflect congressional endorsement of RCM 1004, because the conferees "clearly indicate[d]" that Article 106a should not be "read as validating or invalidating" that Rule. Pet. 18. The conferees, however, endorsed the use of RCM 1004's procedures in espionage cases, and their statement that nothing in Article 106a would preclude prosecution under other provisions of the UCMJ or affect the "validity" of RCM 1004, can only be read as expressing agreement that RCM 1004 is lawful.

b. The President's exercise of that authority to promulgate aggravating factors does not violate the "nondelegation doctrine" or the Eighth Amendment. Petitioner's broad claim that the Eighth Amendment requires that Congress prescribe aggravating factors (Pet. 9-10) is not supported by this Court's cases. Nothing in the Eighth Amendment requires that a *legislature* provide the narrowing of death-eligible defendants required by this Court's cases. See, *e.g.*, *Zant* v. *Stephens*, 462 U.S. 862, 880 (1983) (to determine if jury's discretion is sufficiently channeled in capital cases, court may look to "court-imposed standards to govern the jury" in its deliberations).

As for the "nondelegation doctrine," it is directed to situations in which Congress is alleged to have given the Executive the power to "make a[] Law[]," Art. I, § 8, Cl. 18, in the first instance, rather than to "take Care that the Laws be faithfully executed," Art. II, § 3. *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 421 (1935); *Field* v. *Clark*, 143 U.S. 649, 692 (1892).[5]

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[5] This Court has invalidated a law on the ground of improper delegation in only two cases: *Panama Refining Co.* v. *Ryan*, *supra*, and *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935). In each of those cases, the Court found that the statute at issue "declare[d] no policy" as to the subject matter of the delegation and left the Executive with "unlimited

Here, Congress *has* made the "law" governing the conduct of servicemembers. The Constitution authorizes Congress to "make Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8, Cl. 14, which includes the power to define crimes and affix their punishment, *Solorio* v. *United States*, 483 U.S. 435, 438-439 (1987). Article 118 is just such a "Rule[]"; it defines both the offense of murder and its punishment. Congress therefore has exercised its power to regulate the military. What Congress has done through Articles 18, 36, 56, and 106a is to give the President the power to ensure that Article 118 can be implemented in a constitutional manner by courts-martial. That power does not offend nondelegation principles.

Contrary to petitioner's contention that the powers already exercised by the President under the Constitution make him categorically ineligible for exercising additional delegated authority in this area (Pet. 12-14), this Court has recognized that the limits on Congress's delegation power are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." *United States* v. *Mazurie*, 419 U.S. 544, 556-557 (1975); see also *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542-543 (1950) (immigration); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-322 (1936) (foreign affairs); *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 12 (1926) (Commander-in-Chief power); cf. *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 220-223 (1989). This is such a case. As "Commander in Chief of the Army and Navy," Art. II, § 2, Cl. 1, the President has the inherent power to adopt measures necessary to promote military discipline, see *United States* v. *Eliason*, 41 U.S. (16 Pet.) 291, 301-302 (1842); see also *Kurtz* v. *Moffitt*, 115 U.S. 487, 503 (1885), or to regulate court-martial proceedings, cf. *Swaim* v. *United States*, 165 U.S. 553, 557-558 (1897). Indeed, this Court has consistently held that Congress can grant rulemaking authority to Article III courts, since that authority is a reasonable adjunct to their inherent power to adjudicate cases. See, *e.g.*, *Mistretta* v. *United States*, 488 U.S. 361, 387-388 (1989); *Hanna* v. *Plumer*, 380 U.S. 460 (1965); *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 9-10 (1941); *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825). Congress has no greater duty to specify the factors for the President to consider when he issues rules ensuring that courts-martial operate in a constitutional manner than Congress must specify for the federal courts to consider in ensuring that cases will be adjudicated properly.

Nonetheless, Congress has not left the President without guidance. Article 36 states that the court-martial rules promulgated by the President "shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." 10 U.S.C. 836. The "principles of law" recognized by the district courts include constitutional rules established by this Court's capital punishment decisions. *Gregg* approved the sentencing standards found in the Model Penal Code, 428 U.S. at 193-194 n.44 (lead opinion), and also upheld the

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authority to determine the policy * * * as he may see fit." *Panama Refining*, 293 U.S. at 415.

Georgia capital sentencing scheme, which generally follows the Model Penal Code, *id.* at 164-166 & n.9, 196-198 (lead opinion); *McCleskey*, 481 U.S. at 302 & n.24; see also *Proffitt* v. *Florida*, 428 U.S. 242, 248-249 n.6 (1976) (lead opinion). The aggravating factors in Rule 1004 have close analogues in the Model Penal Code and the Georgia and Florida statutes. See *Manual* A21-69. Moreover, Article 36 is not the only source of congressional policy in this regard. Congress has authorized the death penalty for various offenses, *Stanford* v. *Kentucky*, 492 U.S. 361, 372 n.4 (1989) (collecting laws), and those statutes evidence Congress's policy judgments about the conduct warranting that sentence. The President can take those judgments into account in formulating aggravating factors, and, as the court of appeals recognized in *Curtis* (Pet. App. 368a-375a), RCM 1004 does just that.

Nor does it matter whether the aggravating factors in RCM 1004 are viewed as in some sense "substantive" (Pet. 11 & n.16), because separation-of-powers analysis "does not turn on the labeling of an activity as 'substantive' as opposed to 'procedural.'" *Mistretta*, 488 U.S. at 393. More important is the fact that the delegation challenged by petitioner "pose[s] no threat of undermining the integrity of the [Executive] Branch or of expanding [its] powers * * * beyond constitutional bounds," *ibid.*, for several reasons. First, as this Court recognized in *Mistretta*, "the [federal] sentencing function long has been a peculiarly shared responsibility among the Branches of Government and has never been thought of as the exclusive constitutional province of any one Branch." *Id.* at 390. In the military context, that

responsibility has been historically shared principally by the Legislative and Executive Branches, because courts-martial have never been thought to be Article III courts. See *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65, 79 (1858).[6] Second, the President's exercise of such rulemaking authority does not improperly consolidate the prosecution and sentencing functions, because the sentencing decision is left to servicemembers who are protected against improper in-

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[6] Congress has traditionally left sentencing in military prosecutions largely to the Executive Branch. Most of the offenses enumerated in the Articles of War of 1776 provided that the sentence upon conviction would be determined by the judgment of the court-martial. See W. Winthrop, *Military Law and Precedents* App. X. at 961-967 (2d ed. 1920 reprint). That practice was continued when Congress revised the Articles of War in 1806 and 1874, *id.* App. XII. at 976-981; App. XIII. at 986-991, and it extended to capital offenses. See, *e.g.*, Articles of War of 1874, Arts. 41-46 (each providing that defendant "shall suffer death, or such other punishment as a court-martial may direct"). In 1890 Congress directed that whenever the sentence was left to the discretion of the court-martial by the Articles of War, "the punishment * * * shall not, in time of peace, be in excess of a limit which the President may prescribe." Act of Sept. 27, 1890, ch. 998, 26 Stat. 491. Thus, a long history, predating the Constitution itself, shows that Congress has always understood the determination of court-martial sentences to be a matter properly resting within the special competence of the Executive Branch officials most directly responsible for the maintenance of military discipline. See A. Sullivan, *The President's Power to Promulgate Death Penalty Standards*, 125 Mil. L. Rev. 143, 157 (1989). Cf. *Bowsher* v. *Synar*, 478 U.S. 714, 723-724 (1986) (historical evidence is a valuable guide in separation of powers controversies).

fluence or retaliation. Cf. *Mistretta*, 488 U.S. at 393-395.[7]

Third, Articles 18, 36, 56, and 106a do not allow the President to impose capital punishment in cases where Congress has not itself authorized that pen-

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[7] Contrary to petitioner's repeated suggestions that the President or military commanders can easily exert improper influence over courts-martial and their members (Pet. 26-28 & nn.28, 31), the military justice system includes strong safeguards to prevent that from occurring. This Court recently found those safeguards significant in concluding that the Constitution does not require that military judges be given a fixed term of office:

> Article 26 * * * protects against command influence by precluding a convening officer or any commanding officer from preparing or reviewing any report concerning the effectiveness, fitness, or efficiency of a military judge relating to his judicial duties. *Ibid.* Article 37 prohibits convening officers from censuring, reprimanding, or admonishing a military judge [or court-martial member] "with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding." 10 U.S.C. § 837. Any officer who "knowingly and intentionally fails to enforce or comply" with Article 37 "shall be punished as a court-martial may direct." Article 98, UCMJ, 10 U.S.C. § 898.

Weiss v. *United States*, 114 S. Ct. 752, 762 (1994). In addition, Article 51, 10 U.S.C. 851, provides that panel members must vote by secret written ballot, and Mil. R. Evid. 606(b) permits court-martial members to be questioned on "whether there was unlawful command influence," and that information may be used to impeach the verdict. See Pet. App. 17a-18a. Finally, as this Court recently noted, "[t]he entire system * * * is overseen by the Court of Military Appeals, which is composed entirely of civilian judges * * *. That court has demonstrated its vigilance in checking any attempts to exert improper influence." *Weiss*, 114 S. Ct. at 762.

alty. Those Articles only allow the President to limit or regulate its use. The President has always had the power to reduce a servicemember's sentence under his power "to grant Reprieves and Pardons," Art. II, § 2, Cl. 1, regardless of minimum and maximum penalties set by law. *Schick* v. *Reed*, 419 U.S. 256 (1974); *Ex parte Wells*, 59 U.S. (18 How.) 307 (1856). And the President's power to channel the imposition of the death penalty is a reasonable adjunct to his authority to regulate courts-martial. Cf. *Mistretta*, 488 U.S. at 395-396. While RCM 1004, like the Sentencing Guidelines upheld in *Mistretta*, may influence servicemembers' actions, the Rule does not "bind or regulate the primary conduct" of servicemen, and does "no more than fetter the discretion of [courts-martial] to do what they have done for generations—impose sentences within the broad limits established by Congress." 488 U.S. at 396.

Finally, Congress's judgment that the President should have the authority to promulgate sentencing procedures, including aggravating factors for capital or noncapital cases, is sensible. This Court's decisions in cases such as *Gregg* have identified various procedures that satisfy the concerns underlying *Furman*. Because the President adopts the *Manual* for use by courts-martial, Congress could reasonably have believed that the President is in the best position to ensure that the procedures required by this Court's cases can be implemented quickly and revised when necessary in that specialized field, just as he can ensure that courts-martial follow whatever other rules are imposed by this Court or the military courts. Congress also could have believed that the President is in a better position to determine what

factors are necessary to ensure adequate military discipline. In those circumstances, the combined effect of the President's inherent Article II power and the authority given him by the UCMJ means that the President's power to adopt rules such as Rule 1004 is at its zenith. See, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654, 668 (1981); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

2. Petitioner also contends (Pet. 23-28) that the military sentencing procedures are unconstitutional because they allow a capital sentence to be imposed when, as was the case here, the court-martial panel consists of fewer than 12 members. See Article 16(1)(A), UCMJ, 10 U.S.C. 816(1)(A) (general court-martial may consist of "a military judge and not less than five members"); see also Article 52(b)(1), UCMJ, 10 U.S.C. 852(b)(1) (unanimity required when court-martial imposes sentence of death). That claim finds no support in the controlling decisions of this Court.

While petitioner relies on this Court's decisions construing the Sixth Amendment Jury Trial Clause, Pet. 24, 26 (citing *Williams* v. *Florida*, 399 U.S. 78 (1970), and *Ballew* v. *Georgia*, 435 U.S. 223 (1978)), it is well settled that the Jury Trial Clause does not apply to courts-martial. *E.g.*, *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866).[8] The Fifth Amendment

[8] See also *Ex parte Quirin*, 317 U.S. 1, 40-41 (1942); *Whelchel* v. *McDonald*, 340 U.S. 122, 127 (1950); *Reid* v. *Covert*, 354 U.S. 1, 19 (1957) (plurality opinion); *O'Callahan* v. *Parker*, 395 U.S. 258, 261 (1969), overruled on other grounds, *Solorio* v. *United States*, 483 U.S. 435 (1987); *United States* v. *McClain*, 22 M.J. 124, 128 (C.M.A. 1986). Accord *Mendrano* v. *Smith*, 797 F.2d 1538, 1544 (10th Cir. 1986); *King* v. *Moseley*, 430 F.2d 732, 734 (10th Cir. 1970); *Branford* v. *United States*, 356 F.2d 876, 877 (7th Cir. 1966); *Owens* v. *Markley*, 289 F.2d 751, 752 (7th Cir. 1961). See generally G. Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 Harv. L. Rev. 293 (1957).

specifically exempts "cases arising in the land or naval forces" from the requirement of an indictment by a grand jury for serious crimes. By drafting the Fifth Amendment in that manner, "the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth." *Ex parte Milligan*, 71 U.S. (4 Wall.) at 123. As the Court explained in *Ex parte Quirin*, 317 U.S. 1, 39 (1942), neither Article III of the Constitution nor the Sixth Amendment requires a trial by jury in the military, because those provisions were intended "to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law * * *, but not to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right." Accordingly, because petitioner had no Sixth Amendment right to a trial by a petit jury, he also had no right under the Jury Trial Clause to a court-martial panel composed of 12 persons.[9]

[9] In any event, an eight-person panel, as petitioner had, would be sufficiently large to satisfy the Constitution. *Williams* v. *Florida*, 399 U.S. 78, 86-103 (1970) (a six-person jury is sufficient). Petitioner's reliance (Pet. 26) on *Ballew* v. *Georgia*, 435 U.S. 223 (1978), is misplaced, because *Ballew* involved a five-person jury, whereas the panel in appellant's case had eight members. Indeed, petitioner does not claim that the panel was too small to find him guilty, but only to sentence him. The

Petitioner's reliance on the Eighth Amendment is similarly misplaced. The Eighth Amendment does not guarantee a defendant in a capital case (or in any other) the right to have the jury fix his punishment, even when a sentence requires specific findings of fact. See, *e.g.*, *Harris* v. *Alabama*, 115 S. Ct. 1031, 1034-1035 (1995); *Walton* v. *Arizona*, 497 U.S. 639, 648 (1990); *Spaziano* v. *Florida*, 468 U.S. 447, 459 (1984). Thus, while petitioner is correct that this Court's cases reflect the need for a higher degree of reliability in capital cases, this Court has repeatedly rejected the claim that jury sentencing is an indispensable means to achieving that reliability.

Petitioner's claim fares no better under the Due Process Clause. Pet. 24-25 & n.26. The Constitution authorizes Congress to "make Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8, Cl. 14, and grants Congress "primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military." *Solorio* v. *United States*, 483 U.S. 435, 447 (1987). See also *Burns* v. *Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion). Congress's judgment about the number of members that may appropriately comprise a court-martial is entitled to special deference, not only because "[t]he constitution of courts-martial, like other matters relating to their organization and administration * * *, is a matter appropriate for congressional action," *Whelchel* v. *McDonald*, 340 U.S. 122, 127 (1950); see also *Weiss* v. *United States*, 114 S. Ct. 752, 760-761 (1994), but also because the

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Sixth Amendment, however, does not require jury sentencing at all, even in capital cases. See, *e.g.*, *Hildwin* v. *Florida*, 490 U.S. 638, 639-640 (1989) (per curiam).

practices at issue have been carried forward from the earliest days of our nation. Cf. *Solorio* v. *United States*, 483 U.S. at 447.

In support of his due process argument, petitioner relies heavily (Pet. 24-25) on the fact that many States leave the capital sentencing decision to 12 jurors, rather than to some fewer number. Because some States, such as Florida and Arizona, leave the final decision to the trial judge, rather than to the jury, there is no societal consensus as to 12-person sentencing. And, in any event, the state experience is in the civilian capital sentencing context and therefore does not bear on the proper sentencing procedures for courts-martial. Compare *Weiss* v. *United States*, 114 S. Ct. at 760-761. In the military context, Congress's judgment as to the appropriate size of courts-martial is a reasonable one. The essential function of the military is "to fight or be ready to fight wars should the occasion arise." *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 17 (1955). When servicemembers are diverted from that function by the need to serve as court-martial panel members, "the basic fighting purpose of armies is not served." *Ibid.* Congress reasonably determined that the rights of servicemen are adequately protected by the court-martial process without insisting on the further diversion of resources that would be required to provide 12-member panels in each case.[10]

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[10] Moreover, as the court of appeals noted in *Curtis*, defendants found guilty and sentenced to death by courts-martial enjoy safeguards not available to persons convicted and sentenced to death in civilian courts, including the convening authority's power to commute the sentence and the fact that "a

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Court of Military Review, composed of trained appellate military judges, must thoroughly review the law, the facts, and the appropriateness of the accused's sentence." Pet. App. 377a; see also *id.* at 152a (opinion below) ("the convening authority may set aside or reduce the sentence for any reason"). Indeed, unlike civilian appellate courts that review sufficiency claims under a deferential standard, *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979), military courts have required the prosecution independently to prove the defendant's guilt before a court of military review. A court of military review must independently review the record and be convinced of the correctness of the court-martial panel's findings, including its ultimate finding that the accused is guilty, before the findings may be upheld. See Art. 66(c), UCMJ, 10 U.S.C. 866(c); *United States* v. *Palenius*, 2 M.J. 86, 91 n.7 (C.M.A. 1977); see also *Ryder* v. *United States*, 115 S. Ct. 2031, 2037-2038 (1995); Pet. App. 152a (opinion below).